IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.513 OF 2001

M/s.Ajit Engineering Works &
2 ors. ..Appellants.

V/s.

Maharashtra Rajya Vidyut
Vitharan Company Maryadit. ..Respondent.

Mr.G.S.Godbole with Wamarkar i/b. M. Wamarkar & Co. for appellants.

Mrs. A.R.S.Baxi for respondent No.1.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 24, 2007.

ORAL ORDER :

1. This appeal is directed against the Judgment and Order passed by the Civil Judge, Senior Division, Thane, dated September 29, 2000 in M.A.No.762 of 1998. The appellants are the original defendants. The respondent/plaintiff instituted suit being Special Civil Suit No.455 of 1993 for recovery of energy charges alongwith interest accrued thereon. It is seen that the appellants/defendants contested the suit by filing written statement. The suit proceeded upto recording of evidence of plaintiff. It is also seen that on 1st April, 1997, the hearing of the suit was deferred to explore possibility of

conciliation between the parties. It is also seen from the roznama that the appellants/defendants did not make appearance before the Court for about 13 occasions thereafter. The trial Court eventually passed an exparte decree on 23rd March, 1998. The appellants/defendants took out application for setting aside the said exparte decree only on 17th November, 1998. Delay in filing that application however, came to be condoned by the trial Court. Accordingly, the application for setting aside the exparte decree was required to be considered on its own merits. At the same time, the respondent/plaintiff proceeded with the execution proceeding by filing Darkhast application. The application preferred by the appellants/defendants for setting aside the exparte decree eventually came to be dismissed on 29th September, 2000. It is common ground that there was no stay to the Darkhast proceeding.

2. Be that as it may, the lower Court has rejected the application for setting aside the exparte decree preferred by the appellants/defendants on the reasoning that the appellants/defendants after depositing sum of Rs.5 Lakhs in Court by way of interim arrangement slept over the matter and

committed defaults in paying even electricity bills. The trial Court has then observed that the hearing of the suit was deferred on account of absence of appellants/defendants on 10 to 13 occasions. The trial Court has also considered the explanation offered on behalf of the appellants/defendants that they were under mistaken belief that the suit will not proceed on merits, as negotiations were going on between the parties in conciliation. The Court has also adverted to the explanation offered on behalf of the appellants that the appellants did not appear before the Court, instead deputed the clerk to find out the progress of the matter and that the clerk was advised by the bench clerk that it was not necessary to attend the hearing of this Court in view of the settlement talks in progress between the parties. Lastly, the trial Court has noted that the exparte decree came to be passed on 23rd March, 1998 and after such a long time, no indulgence can be shown in favour of the appellants on account of inordinate delay in favour of the applicants for setting aside exparte decree. On this reasoning the application preferred by the appellants came to be dismissed, which decision is subject matter of challenge in this appeal.

3. After hearing the counsel for the parties, I have no difficulty in accepting the argument of the appellants that the last reason recorded by the trial Court was not germane to decide the point in issue. The fact that there was delay in filing application for setting aside exparte decree, that issue was already examined and delay was condoned by the concerned Court. Once again the same ground cannot be used to consider the merits of the application for setting aside the exparte decree.

4. Even so, in my opinion, the trial Court was right in rejecting the explanation given by the appellants that they were advised by the Bench clerk not to attend court proceeding, on the basis of which, they stayed away from the hearing of the suit. In the first place, it is inconceivable that the matter which involves such heavy stakes for the appellants, they would prefer to rest on the advise of the Bench Clerk, when they were represented by able advocates. The explanation given by the appellants that their clerk used to attend relevant dates, presupposes that the appellants were aware about the progress of the suit. I am willing to accept the argument of the respondent-corporation that the attempt of the appellants was only to

protract the proceedings for one reason or the other, so as to defeat or delay the rightful claim of the corporation, which is in relation to the outstanding electricity bills of 1993. In the circumstances, if any indulgence is to be shown to the appellants, the same can be, only if, the appellants were put to terms. The appellants will have to compensate the Corporation, which is a public body, for the legal expenses incurred at different stages of the proceedings before different courts arising out of outstanding electricity bills for period before 1993. I am conscious of the fact that the appellants have already deposited a sum of Rs.5 Lakhs in the trial Court. However, it cannot be overlooked that the total outstanding electricity bills payable by the appellants-according to the Corporation is in the sum of Rs.12 Lakhs alongwith the interest accrued thereon since 1993 as per the contractual rate. Be that as it may, the Corporation was not only required to engage advocates as well as depute its officers to attend to the proceedings on several dates before the trial Court, during which the appellants remained absent. Besides, the Corporation was required to institute Darkhast application, which is pending for last 8 years; and which has been diligently pursued from time to time, as there is no interim stay

granted by this Court to the further proceeding of Darkhast application. In addition, the Corporation were required to contest the application preferred by the appellants, namely, the application for condonation of delay in filing application for setting aside the exparte decree and also for application for setting aside the decree and restoration of the suit, which was eventually rejected by the concerned court after hearing, two years from the date of the filing of the same. In addition, the Corporation was required to contest the present appeal from order which has remained pending in this court from 2001. Obviously, for pursuing so many legal actions, corporation has had suffered heavy legal expenses. Besides, officials of the Corporation must have spent their valuable time in attending to the Court matter. All their effort will be nullified, if the exparte decree was to be set aside. For this the Corporation will have to be suitably compensated.

5. Counsel for the appellants submits that the amount of cost to be paid as per the decree is only to the extent of Rs.8112/- towards advocate’s fees. That figure is obviously arrived on the basis of the scale prescribed as per the Rules, which is on the

conservative side. Whereas, if actual costs were to be reckoned for all the abovenoted proceedings between the parties before different forums and the valuable time spent by the officers of the Corporation, it cannot be compensated by any amount but less than Rs.75,000/-, as is rightly submitted by the counsel for the Corporation.

6. Counsel for the appellants however, placed reliance on the decision of the Apex Court reported in **AIR 2002 Supreme Court 2082(Vijay Kumar Madan V/s. R.N.Gupta Technical Education Society**), to contend that the Apex Court has deprecated the approach in awarding costs which are not commensurate. It is submitted that the costs should be commensurate and not excessive. My attention is invited to the paragraph-8 of the operative order in the said decision to contend that the reasonable amount towards costs would not exceed Rs.50,000/-. In the present case, however, I am in agreement with the claim put forth by the counsel for the Corporation that sum of Rs.75,000/- towards costs to say the least would be on the conservative side. In as much as, the appellants failed to appear before the trial Court before grant of exparte decree on 13 occasions. The execution application has been pending for over 8

years and pursued by the corporation, for which legal expenses and man hours have been wasted. The Corporation was also required to contest restoration application before the lower Court and appeal before this Court, for which legal expenses have been incurred for several appearances. Although, the Execution Court has computed the costs of the trial at Rs.8,000/-, the same is on the basis of scale prescribed by the Rules. It is well known fact that the amount specified under the Rules towards costs is unrealistic. It is not the actual costs. Thus understood, I am inclined to accept the argument of the Corporation that minimum costs to be awarded in the fact situation of this case should be Rs.75,000/-.

7. To conclude, indulgence is shown to the appellants for setting aside the exparte decree, on condition that the appellants will pay costs quantified at Rs.75,000/- to the respondent/plaintiff within four weeks from today, failing which, the order passed by the trial Court of refusing to set aside exparte decree against the appellants will stand restored. In case the appellants were to pay the costs as aforesaid in time, the suit will get restored to the original number before the trial

Court for being heard and decided on merits in accordance with law. The parties shall appear before the trial Court on 23rd February, 2007 to facilitate the Court to pass necessary directions.

8. If the appellants were to comply with the above condition in time, the appellants will then give full cooperation to the trial Court for early disposal of the suit and shall not seek adjournment on any count, even on a single date. The suit, if restored in terms of this order, shall proceed on day to day basis before the trial Court to be finally disposed of, not later than six months from today. The trial Court shall proceed from the stage of recording of cross-examination of the plaintiff's witness.

9. It will be open to the trial Court to consider whether the parties can be permitted to adduce additional evidence, if situation so warrants. That request can be considered on its own merits in accordance with the law.

10. Accordingly, appeal succeeds on the above conditions.